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MITCHELL TRANSPARENT ICE CO. v. TRIUMPH ELECTRIC CO.

Sept. 7, 1914.

[82 S. E. 730.]

1. Appeal and Error (§ 852*)—Review—Nature of Remedy—Seller's Lien—Enforcement—Statutory Proceeding.—Code 1904, § 2462, subd. 2, provides that a seller's lien for purchase money may be enforced by a petition which shall state the contract, plaintiff's claim, and describe the property, and in answer defendant may state his grounds of defense, and his counterclaim or offset, to which plaintiff may reply. Held, that the remedy at law thereby provided did not supersede or affect the seller's right to sue in equity to enforce his lien, and hence the seller having elected to sue at law under the statute, the case could not be treated on writ of error as a suit in equity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3402; Dec. Dig. § 852.* 1 Va.-W. Va. Enc. Dig. 358.]

2. Evidence (§ 434*)—Parol Evidence—Written Contract—Fraud—Misrepresentations.—Misrepresentations or fraud in procuring a contract may be shown, though the contract itself has been reduced to writing, but the proof, in order to establish the fraud, must be convincing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005-2020; Dec. Dig. § 434.* 10 Va.-W. Va. Enc. Dig. 726.]

Error to Circuit Court, Tazewell County.

Action by the Triumph Electric Company against the Mitchell Transparent Ice Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Henry & Graham & Hawthorne, of Tazewell, for plaintiff in error.

Greever & Gillespie, of Tazewell, for defendant in error.

CHESAPEAKE & O. RY. CO. v. TINSLEY.

Sept. 7, 1914.

[82 S. E. 732.]

1. Pleading (§ 204*)—Demurrer—Count Bad in Part.—Faulty assignments in a count containing separable matters, some of which are good and some of which are bad, may be reached by demurrer, specifically stating the grounds of demurrer relied on.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486-490; Dec. Dig. § 204.* 4 Va.-W. Va. Enc. Dig. 468.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

2. Carriers (§ 314*)—Injury to Passengers Alighting—Complaint.—The complaint of a passenger for injuries in alighting, her coach being stopped beyond the station platform, and she being required to alight, where the ground was rough and 30 inches below the lowest step of the coach, no steps or aid by the conductor being furnished, held to state a good cause of action.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1260, 1270, 1273, 1274, 1276-1280; Dec. Dig. § 314.* 2 Va.-W. Va. Enc. Dig. 700, 721.]

3. Damages (§ 52*)—Fright as Ground of Recovery.—Fright, unaccompanied by personal injury, from mere negligence, is not ground for recovery.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 100, 255; Dec. Dig. § 52.* 4 Va.-W. Va. Enc. Dig. 196.]

Error to Circuit Court, Bedford County.

Action by one Tinsley against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

Harrison & Long, of Lynchburg, for plaintiff in error.

Wm. K. Allen, of Amherst, for defendant in error.

BROWN *v.* CAROLINA C. & O. RY. CO.

Sept. 7, 1914.

[82 S. W. 733.]

1. Motions (§ 59*)—Final Order—Setting Aside.—Where a final order of dismissal is made in vacation, the court at a subsequent term has no authority to reopen the case and set aside the order.

[Ed. Note.—For other cases, see *Motions*, Cent. Dig. §§ 73-81; Dec. Dig. § 59.* 4 Va.-W. Va. Enc. Dig. 708.]

2. Process (§§ 28, 37, 163*)—Writs—Validity.—A summons which does not run in the name of the “commonwealth of Virginia,” or which is not attested by the clerk of the court, as required by Const. 1902, § 106 (Code 1904, p. ccxxxvi), is void and cannot be amended.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. §§ 22, 32, 224-238; Dec. Dig. §§ 28, 37, 163.* 12 Va.-W. Va. Enc. Dig. 1025.]

3. Appeal and Error (§§ 66, 344*)—Writ or Error—Time—Final Order.—On August 21, 1912, the court made a vacation order quashing the service of a summons because not signed or attested by the clerk, as required by Const. 192, § 106 (Code 1904, § 106 (Code 1904, p. ccxxxvi), and on September 26th overruled a motion to set aside the former order of dismissal. More than a year after the entry

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.